

MEMORANDUM

OFFICE OF THE
MAR 03 2006
LIEUTENANT GOVERNOR

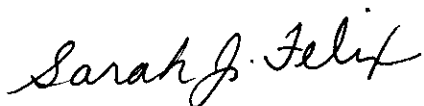
State of Alaska
Department of Law

To: The Honorable Loren Leman
Lieutenant Governor

Date: March 2, 2006

File No.: 663-06-0134

Tel. No.: 465-3600


From: Sarah J. Felix
Assistant Attorney General
Labor and State Affairs – Juneau

Re: Review of Initiative Application
on Video Lottery Law

I. INTRODUCTION AND SUMMARY

You have asked us to review an application for an initiative petition entitled “State of Alaska Video Lottery Law Providing for Limited Gaming Facilities and Enacting New Article 5, Video Lottery Law of Chapter 5.15 of Title 5 of the Alaska Statutes.” We have completed our review and find that the application does not comply with the constitutional and statutory provisions governing the use of the initiative because it violates the constitutional prohibition against use of the initiative to enact special and local legislation. Under these circumstances we recommend that you do not certify the application.

This initiative petition is similar to three other initiative petitions submitted last year. We reviewed each and recommended that you deny certification. *See* 2005 Inf. Op. Att’y Gen. (Nov. 23; 663-05-0048); 2005 Inf. Op. Att’y Gen. (Aug. 1; 663-05-0239); 2005 Inf. Op. Att’y Gen. (April 19; 663-05-0177).

The sponsors have made changes to the bill in the current application. Those changes, however, are not sufficient to remedy the deficiency in the bill that we identified in our earlier reviews. The proposed bill still contains local and special legislation, which is prohibited from the initiative by the Alaska Constitution article XI, section 7.

II. SUMMARY OF THE PROPOSED BILL AND ANALYSIS

A. Summary

The initiative sponsors represent that this bill is “identical to the third [VLT] initiative,” except in one respect. Proposed AS 05.15.707(h)(ii) on page 13 is revised “to allow one licensee for each 125,000 borough residents or fraction thereof.” Since the remainder of the bill is identical to the third VLT initiative, we incorporate our summary of that bill by reference. *See* 2005 Inf. Op. Att’y Gen. 1-5 (Nov. 23; 663-05-0048).

B. Analysis

Under AS 15.45.070, the Lieutenant Governor is required to review an application for a proposed initiative and either “certify it or notify the initiative committee of the grounds for denial.” The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

1. The form of the proposed bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, “Be it enacted by the People of the State of Alaska”; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.

The bill is confined to one subject: video lotteries. The subject of the bill is expressed in the title. The enacting clause is set forth correctly. The bill does, however, include a prohibited subject. Accordingly, the bill is not in the required form.

Each of the four video lottery initiative bills have the following significant fact in common. They create a “gaming district” on a specific piece of property. The property description of this gaming district is identified as follows:

The West One-Half of the North-East One-Quarter of the Northwest One-Quarter (W1/2 of the NE 1/4 of the NW 1/4) of Section One (1), Township (12) North, Range Four (4) West, Seward Meridian, Anchorage Recording District, Third Judicial District, State of Alaska.

Sec. 2 of proposed bill (AS 05.15.701(8)(a)). According to the records of the Department of Natural Resources this property is located near the intersection of Minnesota and Raspberry Road in south Anchorage. According to the records of the Municipality of Anchorage Finance Department, the property is owned by one Justin Green. We understand that the media has reported that one of the sponsors of this initiative, Victoria Scott, has an option to purchase this property. See Matt Volz, *Alaska Video Gaming Initiative Returns*, Anch. Daily News, July 19, 2005.

In addition to this particular gaming district, the bill also permits the creation of other gaming districts. The Department of Revenue must first designate a gaming district under AS 05.15.707(3)(h). Then the gaming district must be approved by a majority of voters of the borough in which the gaming district is located. AS 05.15.701(8). The bill prohibits the Department from designating a gaming district in a borough with a population of less than 30,000. AS 05.15.707(3)(h)(i). The bill also prohibits more than one license per 125,000 borough residents. AS 05.15.707(3)(h)(ii).

Under the bill, an "eligible applicant" is someone who owns, holds an option to purchase, or leases for 10 years an "acceptable parcel" within a gaming district. AS 05.15.701(6). "Acceptable parcel" is defined to mean at least 10 acres of land. AS 05.15.701(1).

An eligible applicant may apply for a license to conduct VLT Gaming Operations in the gaming district. AS 05.15.703. Following the submission of a complete application, the Department of Revenue is required to issue a license upon a finding that the applicant is eligible and suitable. AS 05.15.703(1); AS 05.15.705 -- .706. In the three prior applications the Department was prohibited under AS 05.15.707(3)(h) from issuing more than one license in any one borough. In this application the sponsors have revised proposed AS 05.15.707(3)(h) to allow the department to create one or more additional gaming districts in addition to the South Anchorage gaming district created in AS 05.15.701(8)(a). These additional gaming districts are "subject to and conditioned upon the approval of a majority of the registered voters of the borough within which the Gaming District is to be provided." AS 05.15.707(3)(h). Further, under proposed AS 05.15.707(3)(h)(ii) the department may not issue "more than one License per 125,000 residents."

The practical effect of this scheme is that the owner, option-holder or leaseholder of the south Anchorage property identified by the bill is authorized to submit an application for a license prior to the Department having the opportunity to designate any other gaming district, and prior to any vote on such additional gaming districts. Assuming that the owner or option holder of this property is qualified to obtain a license under this bill, the Department must issue it to them. Thereafter, the Department may only issue two more licenses in Anchorage. These two additional licenses would be issued only if approved by a majority of the voters in the Anchorage borough. Therefore, it appears an almost certainty that the owner or option holder of the south Anchorage property will be granted a video gaming license within Anchorage. The remaining two licenses for the Anchorage borough would be issued, if at all, at a later time, and after a vote of approval from the majority of the voters in the Anchorage borough. This appears to be consistent with the sponsors' alleged statements concerning the third VLT initiative reported by the media:

Ken Jacobus, an Anchorage attorney and a co-sponsor of the initiative, acknowledged there were competitive advantages written into the proposal but said it's fair because the prime sponsor is the one spending the money to get the matter passed. "The person who sponsors this and puts it together would have to recoup their investment," Jacobus said. "The numbers mandate a competitive advantage."

Matt Volz, *Alaska Video Gaming Initiative Returns*, Anch. Daily News, July 19, 2005.¹

In correspondence with your office regarding this issue, counsel for the initiative committee contends: "The problem identified in the most recent rejection was that the prior version of the petition would have provided a monopoly to the sponsor in the Anchorage Borough. This problem has now been completely resolved." See Letter of Jacobus to Office of the Lieutenant Governor of February 18, 2006. Thus, the initiative committee submits that the bill would "allow three VLT licenses in Anchorage, with a fourth license available as Anchorage gets larger in the foreseeable future."

With all due respect, we disagree. The problem with earlier applications for the VLT initiative is that the proposed bill contains local and special legislation, which is expressly prohibited by the Alaska Constitution article XI, section 7. The fact that the prior VLT initiatives created a monopoly for the south Anchorage property holder did indicate that those initiatives contained local and special legislation. However, removing the monopoly status does not entirely remedy the problem. Under the current initiative the holder of the south Anchorage property is still granted a significant benefit – the first license to operate VLTs in the Anchorage borough, which will be granted without the necessity of a vote of approval from the majority of Anchorage borough voters. The remaining two licenses for the Anchorage borough will not be issued until after an approval vote from the majority of the Anchorage borough voters. Thus, we are highly reluctant to conclude, as the initiative committee apparently has, that the revised language of the bill cures the local and special legislation problem.

¹ We place no reliance on these alleged statements, except to say that they appear consistent with our analysis of the bill.

As we have explained previously, the framers of the Alaska Constitution intended to “absolutely prohibit use of the initiative to enact local or special legislation” *See* 2005 Inf. Op. Att’y Gen. 5 (April 19; 663-05-0177).² In order to avoid this constitutional prohibition, there must be a “rational basis for the particular classification” and that classification “must bear a reasonable and proper relationship to the purposes of the act and the problem sought to be remedied.” *Boucher v. Engstrom*, 528 P.2d 456, 463 (Alaska 1974). We have explained this requirement in our reviews of the three prior VLT initiative applications. However, the current version of the bill to be initiated fails to provide a rational basis for the special classification of the south Anchorage property, and does not explain how that special classification relates to the purposes of the bill and the problem sought to be remedied.

As drafted, this bill confers a special benefit on the narrowest class of persons: the owner, option-holder or leaseholder of a single piece of property in south Anchorage. It is precisely the kind of unwarranted special benefit contemplated by the constitutional prohibition on special and local legislation. The fact that the bill makes it theoretically possible for two other persons to obtain a video lottery license in the Anchorage borough does not mitigate the problem. The extremely narrow classification bears no relationship to the purposes of the bill and the problem sought to be remedied. Therefore we conclude that this bill is without rational basis. We recommend, again, rejection of this bill.

2. The form of the application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

² We incorporate by reference our discussion of this issue from our previous opinions. *See* 2005 Inf. Op. Att’y Gen. 1-5 (Nov. 23; 663-05-0048); 2005 Inf. Op. Att’y Gen. 6 (Aug. 1; 663-05-0239); 2005 Inf. Op. Att’y Gen. 5-10 (April 19; 663-05-0177).

The application meets the first three requirements. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

3. Number of qualified sponsors

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors, to the extent this is necessary.

III. CONCLUSION

For the above reasons, we find that the proposed bill is not in the proper form, and therefore recommend that you do not certify this initiative application.

If you decide to reject the initiative, we suggest that you give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will trigger the 30-day appeal period during which these persons must contest your action or be forever barred from doing so. *McAlpine v. University of Alaska*, 762 P.2d 81, 86 (Alaska 1988).

Please contact me if we can be of further assistance to you on this matter.

SJF/rca

cc: Whitney H. Brewster, Director of the Division of Elections